STATE OF MICHIGAN

COURT OF APPEALS

JAMES D. FRILL,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
May 30, 2006

No. 265090
Wayne Circuit Court
LC No. 04-437461-CZ

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from the dismissal of his complaint seeking a declaratory judgment. We affirm in part, vacate in part, and remand for entry of an order dismissing this case pursuant to MCR 2.116(C)(4), without prejudice.

In September 1986, plaintiff James Frill began serving prison sentences for possession of a firearm during the commission of a felony, contrary to MCL 750.227b, armed robbery, in violation of MCL 750.529, criminal sexual conduct in the second degree (CSC-II), in violation of MCL 750.520c, and assault with intent to do great bodily harm less than murder, contrary to MCL 750.84. In May 1996, defendant was convicted of prisoner in possession of a weapon in violation of MCL 800.283(4). He was sentenced in July 1996 as an habitual offender, fourth offense, to 3 to 15 years' imprisonment on that charge.

In November 2002, defendant Department of Corrections (DOC) prepared a parole eligibility report with respect to plaintiff which listed the following offenses as "Active Offenses": assault with intent to do great bodily harm less than murder, armed robbery, CSC-II, and prisoner in possession of a weapon. On February 10, 2003, the DOC prepared a parole guidelines score sheet and, under "Active Sentence Variables," scored points for the following aggravating conditions: (1) weapon or threat of weapon; (2) there was force causing a serious injury; (3) sexual offense or sexually assaultive behavior; (4) more than two victims threatened or involved; (5) victim(s) unusually vulnerable.

Thereafter, plaintiff sought a declaratory ruling from the DOC that, under 1999 AC, R 791.7715(2)(a)(i) (which provides that in making a parole determination the parole board may consider the nature and seriousness of the offenses for which the prisoner is currently serving), the parole board could not consider the nature or seriousness of the offenses for which plaintiff's sentences had been fully served. Defendant responded to plaintiff's request in a March 10, 2003

letter stating that if plaintiff did not receive a ruling within 30 days of the date of receipt of his request, he could consider the request as denied. No ruling on plaintiff's request was issued.

In April 2003, defendant issued a decision denying parole to plaintiff. Plaintiff thereafter commenced this action in circuit court seeking a declaratory judgment that under R 791.7715(2)(a)(i), the parole board could not consider the nature or seriousness of the felony firearm, CSC-II, or assault convictions because he was no longer serving time for those offenses. In lieu of answering plaintiff's complaint, defendant moved to dismiss the case pursuant to MCR 2.116(C)(8) and (10). The trial court granted defendant's motion to dismiss on the basis that it lacked jurisdiction to enter a declaratory judgment under MCL 24.264 because plaintiff was challenging the interpretation rather than the applicability of R 791.7715(2)(a)(i). Plaintiff then moved for a new trial and, at oral argument on the motion, moved to amend his complaint to assert that the court had jurisdiction to enter the declaratory judgment under MCR 2.605. The trial court denied plaintiff's motion for the "reasons that were previously stated in the opinion" and on the basis that the amendment would be "absolutely futile" and dismissed the action with prejudice.

Because the motion was characterized as being sought under MCR 2.116(C)(8) and (10) yet was decided on the basis that the court had no jurisdiction, we review the court's grant of summary disposition under MCR 2.116(C)(4). See *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 143; 530 NW2d 510 (1995). A court may grant summary disposition under MCR 2.116(C)(4) if the pleadings demonstrate that a party is entitled to judgment as a matter of law or if the affidavits and other proofs show that there was no genuine issue of material fact. *Service Employees Int'l Union, Local 466M v City of Saginaw,* 263 Mich App 656, 660; 689 NW2d 521 (2004).

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Corley v Detroit Bd of Ed,* 470 Mich 274, 277; 681 NW2d 342 (2004). The interpretation and application of court rules and statutes present a question of law this Court also reviews de novo (*Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005)), as does whether a court has jurisdiction. *WPW Acquisition Co v City of Troy (On Remand),* 254 Mich App 6, 8; 656 NW2d 881 (2002).

On appeal, plaintiff first contends that the trial court erred in dismissing the declaratory action because the court had jurisdiction to enter the declaratory judgment under MCL 24.264. We disagree.

The DOC is an administrative agency subject to the provisions of the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq*. *Martin v Dep't of Corrections*, 424 Mich 553, 556; 384 NW2d 392 (1986). Under the APA, upon the request of an interested party, "an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency." MCL 24.263. If the agency denies the request or fails to act expeditiously, the aggrieved party may commence a declaratory judgment action in circuit court under MCL 24.264 to question the validity or applicability of an administrative rule.

There is no question that the DOC applied R 791.7715 in determining whether plaintiff was eligible for parole. Plaintiff contends, however, that the DOC *misapplied* the rule by considering the nature or seriousness of offenses for which plaintiff's sentences had been fully

served. Plaintiff further contends that the trial court had jurisdiction to enter the declaratory judgment because, under MCL 24.264, the court had the authority to interpret the rule to determine its "applicability" to plaintiff's case. However, it is the administrative agency, not the court, which may issue a declaratory ruling as to the applicability of a rule "*to an actual state of facts* . . . ." MCL 24.263. MCL 24.264 (which governs the court's authority to enter a declaratory judgment) on the other hand, provides only that "the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff." Notably absent from MCL 24.264 is mention of applying a rule to an actual state of facts. Omission of a provision in one part of a statute that is included in another part should be construed as intentional and the courts should not include provisions not included by the Legislature. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005).

We conclude that while an administrative agency has the authority under MCL 24.263 to determine *how* to apply a rule to a particular set of facts, the circuit court's authority under MCL 24.264 is limited to determining *if* the rule applies to a particular set of facts. Because plaintiff sought a declaratory judgment regarding *how* defendant applied the rules, rather than *whether* defendant was required to apply the rules, we conclude that the trial court did not have jurisdiction to enter the declaratory judgment under MCL 24.264.

The court further lacked jurisdiction to enter the declaratory judgment because plaintiff failed to demonstrate that the application of R 791.7715 would "interfere with or impair" a legal right or privilege, as required by MCL 24.264. It is well established that prisoners have no legal right to parole. *Morales v Parole Board*, 260 Mich App 29, 52; 676 NW2d 221 (2003). Furthermore, because "a prisoner shall not be released on parole until the parole board has considered *all relevant facts and circumstances*," the parole board's consideration of plaintiff's criminal history did not interfere with or impair plaintiff's eligibility for parole. R 791.7715(1) (emphasis added)

Thus, we hold that the trial court did not err in granting summary disposition in favor of defendant and, although the court should have granted summary disposition under MCR 2.116(C)(4), this Court will not reverse a trial court's decision if the correct result is reached for the wrong reason. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

Plaintiff next contends that the trial court erred in denying his motion to amend his complaint. We disagree. This Court reviews a trial court's denial of a motion to amend a complaint for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004).

Plaintiff sought to amend his complaint to assert that the trial court had jurisdiction to enter the declaratory judgment under MCR 2.605(A)(1). However, for purposes of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment. MCR 2.605(A)(2). Thus, MCR 2.605 "neither limits nor expands the subject-matter jurisdiction of the court." *Associated Builders, supra* at 125, citing *Allstate Ins Co v Hayes*, 442 Mich 56, 65 n 9; 499 NW2d 743 (1993). Stated differently, "[t]he declaratory judgment rule

merely provides an additional remedy that a party may seek; it does not create a basis for jurisdiction." *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 573 n 9; 640 NW2d 567 (2002). Thus, because the trial court did not have jurisdiction to enter a declaratory judgment under MCL 24.264 and because MCR 2.605 does not create a basis for jurisdiction, plaintiff's amendment would not have cured the jurisdictional defect.

For the reasons stated above, plaintiff's amendment would have been futile. "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane*, *supra* at 697 (citations omitted). Because an amendment would not be justified if it would be futile, *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004), citing *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), we hold that the trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint. We reject plaintiff's argument that the trial court erred in failing to articulate on the record its reasons for denying plaintiff's motion to amend given that the court specified amendment would be absolutely futile. Moreover, as this Court stated in *Sharp v Lansing*, 238 Mich App 515; 606 NW2d 424 (1999), a court's failure to specify its reasons for denying a motion to amend requires reversal "unless the amendment would be futile." *Id.* at 522 (citations omitted).

Plaintiff next contends that the trial court erred in dismissing plaintiff's action with prejudice. We agree

Generally, a court's decision whether to dismiss a case with prejudice is reviewed for an abuse of discretion. *Rinke v Automotive Moulding Co*, 226 Mich App 432, 439; 573 NW2d 344 (1997), citing *George Morris Cruises v Irwin Yacht & Marine Corp*, 191 Mich App 409, 420; 478 NW2d 693 (1991). However, whether a grant of summary disposition should be with prejudice presents a question of law this Court reviews de novo. *Id.*

Generally, "[w]here a trial court dismisses a case on the merits, the plaintiff should not be allowed to refile the same suit against the same defendant and dismissal should therefore be with prejudice." *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh, PA*, 223 Mich App 559, 563; 567 NW2d 456 (1997). However, a grant of summary disposition for lack of jurisdiction is not an adjudication on the merits. MCR 2.504(B); *McNeil v Quines*, 195 Mich App 199, 201; 489 NW2d 180 (1992), citing *Laude v Cossins*, 334 Mich 622, 625-626; 55 NW2d 123 (1952). Thus, when a case is dismissed for lack of subject matter jurisdiction, the case is generally dismissed without prejudice. See *In re Quinney's Estate*, 287 Mich 329, 338-339; 283 NW 599 (1939). Because plaintiff's case was dismissed for lack of jurisdiction, the trial court should have dismissed plaintiff's case without prejudice. Thus, we vacate the trial court's order dismissing plaintiff's case with prejudice and remand for entry of an order dismissing the case pursuant to MCR 2.116(C)(4), without prejudice.

In light of our decision today, plaintiff's argument that this case should be reassigned to a different judge on remand is moot.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto